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UNPACKING THE LAW AND PRACTICE RELATING TO PAROLE IN SOUTH AFRICA

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1. Introduction

Punishment has different purposes such as retribution, deterrence and rehabilitation.¹ When a court sentences an offender to imprisonment it is guided not only by the law that stipulates the minimum or the maximum sentence that must be imposed but also by the objective(s) of punishment that the judge thinks the sentence imposed must achieve. However, whereas it is within the court's discretion to determine which sentence should be imposed on an offender after considering several factors such as the nature of the offence, the personal characteristics of the offender, and the purpose of punishment, as I illustrate shortly, it is not only the court that has an interest in sentencing. The Constitutional Court held in *S v Dodo*², and recently in *Centre for Child Law v Minister for Justice and Constitutional Development and Others*³, that even the executive has an interest in sentencing. The executive's interest in sentencing lies in the fact that it is the executive, through the Department of Correctional Services (DCS), that enforces prison and certain non-custodial sentences imposed by courts.⁴ It has to be recalled that parole is an integral part of a sentence because it is a continuation of a sentence outside of the correctional facility. In other words, an individual who is on parole is still serving his/her sentence. The history of parole in South Africa is well documented and will

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1 See generally Hudson *Understanding Justice*; Von Hirsch and Ashworth *Principled Sentencing*; and Terblanche *Guide to Sentencing* 155 – 178.

2 *S v Dodo* 2001(3) SA 382(CC).

3 *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (6) SA 632 (CC) 643C-E.

4 Section 2(a) of the Correctional Services Act provides that "[t]he purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by enforcing sentences of the courts in the manner prescribed by [the Correctional Services Act]".

not be repeated here.⁵ Parole has various motivations which include being an alternative to imprisonment,⁶ rewarding offenders for complying with their sentence plan and participating in rehabilitation programmes, and combating recidivism by ensuring the gradual re-integration of offenders.⁷

DCS is also equipped - because it employs social workers and other experts⁸ - to assess if the offender serving a prison term has been rehabilitated and therefore, where applicable, should be released from prison. The issue of whether or not an offender has been rehabilitated is central to determining if he should be paroled.⁹ As at the end of November 2009, there were 40520 parolees in South Africa.¹⁰

This article discusses the law and practice relating to parole in South Africa.¹¹ A conscious decision has been made to exclude the discussion of medical parole and the law relating to the parole of offenders serving life sentences because these two areas have been the subject of recent academic studies.¹² On 1 October 2009 some of the sections of the Correctional Services Amendment Act¹³ came into force. Among the sections that did not come into force on 1 October 2009 are section 48 (which deals with parole) and section 49 (which deals with the incarceration framework). The fact that those provisions are yet to come into force means that they are not discussed in this paper. The paper addresses the following issues relevant to

⁵ See for example, Lidovho 2003 *SACJ* 163 – 177; Moses 2003 *SAJHR* 271-276.

⁶ Bruyns and Cilliers 2009 *Acta Criminologica* 88.

⁷ Cilliers 2006 *Acta Criminologica* ii. See also Louw and Luyt, 2009 *Acta Criminologica* 2 -3.

⁸ It is regrettable that “the resources [that DCS in its 2009/2010 budget allocated for] rehabilitation and reintegration [of offenders] were woefully inadequate”. See MP Selfe’s comments on the Department of Correctional Services Strategic Plan and Budget, 23 June 2009, at <http://www.pmg.org.za/report/20090623-department-correctional-services-strategic-plan-budget> [date of use 20 June 2009].

⁹ In *S v Myburgh* 2007(1) SACR 11(W), where the accused, who has physiological problems, was sentenced to ten and a half years’ imprisonment for public indecency and indecent assault, the court recommended that DCS should place the appellant on rehabilitation programmes during his imprisonment to enable the parole board to grant him parole when his application for parole was being considered.

¹⁰ See Department of Correctional Services “Parole Supervision as on the Last Day of 2009/11” at <http://www.dcs.gov.za/WebStatistics/> [date of use 30 April 2010].

¹¹ Parole is part of what is termed “community corrections” in the Correctional Services Act and should be distinguished from correctional supervision, a sentence option provided for under the Criminal Procedure Act (Act 53 of 1977).

¹² See generally Mujuzi 2009 *SAJBL* 59; Mujuzi 2009 *SACJ* 1 – 38; and van Wyk 2008 *SA Journal of Public Law* 59 – 62.

¹³ Correctional Services Amendment Act, 25 of 2008. See *Government Gazette* No.32608, Notice No. 68 of 1 October 2009. The presidential proclamation indicates that sections 21, 48 and 49 did not come into force on 1 October 2009. The proclamation is silent on the date when the above sections will come into force.

the question of parole in South Africa, which courts have had to deal with: parole as a privilege; the period to be served before an offender is paroled (excluding habitual and dangerous criminals); the meaning and legal status of a non-parole period; and some of the instances where courts have intervened where prisoners' applications for placement on parole have been declined by the relevant authorities.

2. Parole as a privilege

Section 73(1) of the Correctional Services Act¹⁴ provides that "[s]ubject to the provisions of this Act – (a) a sentenced prisoner remains in prison for the full period of sentence; and (b) a prisoner sentenced to life imprisonment remains in prison for the rest of his or her life". The above provisions clearly stipulate that a prison sentence must be served in full, although there are circumstances in which the strict application of that provision may be waived. These are the circumstances under which an offender is released on parole in terms of the relevant provisions of the Correctional Services Act, or is pardoned. Should the parolee violate his parole conditions,¹⁵ he could be arrested and imprisoned to serve his full sentence in prison.¹⁶ It was held in *Motsemme v Minister of Correctional Services and Others*¹⁷, where the applicant, a fully rehabilitated offender, was not released on parole on several occasions although the Court had ordered that he qualified for parole, that "[a]lthough no offender has a right to be paroled, parole is an integral part of the penal system", and that "[w]here an offender therefore has demonstrated by his conduct that he has been rehabilitated and is not a danger to society there is no reason why he should not benefit from the system".¹⁸ In *S v Smith*¹⁹, where the

¹⁴ Correctional Services Act, 111 of 1998.

¹⁵ For details relating to parole conditions see section 52 of the Correctional Services Act.

¹⁶ It was held in *S v Boltney* 2005(1) SACR 278(C) that "[t]he principle [is] that an accused, who broke her or his conditions of parole, should as a rule not be sentenced to a period of imprisonment longer than that which she or he would have served in the normal course of events..." 278.

¹⁷ *Motsemme v Minister of Correctional Services and Others* 2006(2) SACR 277(W).

¹⁸ *Motsemme v Minister of Correctional Services and Others* (n 17) 285. In *Sebe v Minister of Correctional Services and Others* 1999(1) SACR 244(Ck), where the applicant who was sentenced to 21 years' imprisonment for, amongst other offences, malicious injury to property, argued that, in terms of the prison regulations, he had behaved well while serving his prison term and that, therefore, his sentence was supposed to be reduced by seven years. The Court held that "the remission of sentence was a privilege, and not a right, the purpose of which was to serve as an incentive to encourage good, disciplined behaviour and adherence to prison procedures". Pg 245. In *Combrink and another v Minister of Correctional Services and Another* 2001(3) SA 338(D), where the applicants successfully argued that the DCS policy document that

accused was convicted of multiple murders, it was held that it would be inappropriate for a court to impose lengthy prison terms “in an attempt to eliminate any possibility of parole”, and that “[t]he granting of parole ... [falls] within the powers of the executive authority and the Court ought not to attempt to circumvent the exercise of this power”.²⁰ It has also been held in several decisions that the possibility of the offender’s being released on parole should not be invoked by courts to impose lengthy sentences to ensure that prisoners stay in prison longer before being considered for parole. Sentencing should be based on factors such as the seriousness of the offence, the personal circumstances of the accused and the purpose or purposes of punishment that the sentence imposed is intended to serve.²¹ With regard to life imprisonment, the Supreme Court of Appeal held that “it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment”.²²

was passed after they had started serving their sentences had the effect of increasing the period they were required to serve before being considered for parole, the Court held that “... a prisoner has no right to be paroled...Parole is a privilege”. 341.

¹⁹ *S v Smith* 1996(1) SACR 250(E).

²⁰ *S v Smith* (n 19) 251. In *S v Nkosi and Others* 2003(1) SACR 91(SCA), where the first, second, third and fourth appellants were convicted of serious offences including murder and attempted murder, and sentenced to 120, 65, 65, and 45 years’ imprisonment respectively, the Supreme Court of Appeal in sentencing all of them to life imprisonment held, *inter alia*, that “...under the law as it presently stands, when what one may call a Methuselah sentence is imposed (ie a sentence in respect of which the prisoner would require something approximating the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one-half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment...” Para 9.

²¹ In *S v Matlala* 2003(1) SACR 80(SCA), the appellant was sentenced to 40 years’ imprisonment for several serious offences including armed robbery. The High Court Judge ordered that he should be considered for parole only after serving 30 years. The Supreme Court of Appeal, in reducing the sentence to 30 years’ imprisonment, held *inter alia* that the court should not “grade the duration of its sentences by reference to ...[the] conceivable pre-parole components but by reference to the fixed and finite maximum terms it considers appropriate, without any regard to possible parole”. Para 7. In *S v Khumalo en Andere* 1983(2) SA 540(N), in sentencing the first accused to 12 years’ imprisonment for stock theft the Magistrate took into consideration the fact that he would be placed on parole after six years. In reducing the sentence to two years’ imprisonment, the High Court held that “the magistrate’s approach in connection with the release on parole of accused No.1 was wrong and amounted to a serious misdirection”. 540. In *S v Leballo* 1991(1)SACR 398(B), where the trial Judge found the accused guilty of assault and sentenced him to eight years’ imprisonment because, *inter alia*, he wanted him to be incarcerated for a long time before being considered for parole, on appeal it was held that “[t]he fact of possible pardon or parole should not have been taken into account” as justification for a lengthy prison term”. 401. The appellant Court reduced the sentence to a fine of R 2000 or, in default of payment, imprisonment for three years.

²² *S v Bull and Another; S v Chavulla and Others* 2002(1) SA 535(SCA) para 23.

What emerges from the above cases is that, although the release on parole is not a right, the offender has a legitimate expectation that he will be considered for parole and will be placed on parole should he fulfil all of the requirements, for example, that he has served the non-parole period and has been rehabilitated. In cases where the offender meets all of the requirements for placement on parole and is not placed on parole, courts may intervene and order that he be placed on parole, as was the case in *Motsemme v Minister of Correctional Services and Others*.²³

The issue of parole is not exclusive to the judiciary. The discussion now shifts to the roles that the legislature and the executive have played or can play in the parole process. This analysis will form the background to the discussion of the demarcation of the roles each branch of government can play in the parole process. The Constitution establishes and recognises the role of the National Assembly in the “oversight of the exercise of national executive authority including the implementation of legislation”.²⁴ In order to execute that mandate effectively and efficiently, parliament has, pursuant to section 57(2)(a) of the Constitution²⁵, read in conjunction with Rules 121(1)(e) and 199 - 203 of the National Assembly Rules²⁶, established various committees, including the Portfolio Committee on Correctional Services (PCCS or the Committee), which has oversight over the DCS’s activities, including the manner in which parole is administered.²⁷ Practice shows that the PCCS has dealt with the question of parole in at least four ways. First, the PCCS has asked the Minister of Correctional Services or department officials to address it on various aspects of the implementation of the parole legislation. These issues have included the rationale for including civilians on the parole boards;²⁸ the functioning of and challenges facing parole boards in the country;²⁹ and the policies being

²³ *Motsemme v Minister of Correctional Services and Others* 2006(2)SACR 277(W)..

²⁴ Section 55(2)(b)(i).

²⁵ Section 57(2)(a) is to the effect that “[t]he rules and orders of the National Assembly must provide for the establishment, composition, powers, functions, procedures and duration of its committees”.

²⁶ National Assembly Rules (as of June 1999) available at <http://www.pmg.org.za/parlinfo/narules>.

²⁷ Rule 201(1)(b)(i) of the National Assembly Rules provides that a portfolio committee “must maintain oversight of the exercise within its portfolio of national executive authority, including the implementation of legislation”.

²⁸ Human Resources, Construction New Generation Prisons and Parole Boards: Department Briefing, 21 June 2005, at <http://www.pmg.org.za/minutes/20050620-human-resources-constructing-new-generation-prisons-and-parole-boards-department-br> (accessed 6 May 2010).

²⁹ <http://www.pmg.org.za/minutes/20060904-parole-board-implementation-input-twelve-parole-board-chairpersons-minister> [date of use 6 May 2010].

implemented to reduce parole violations and to improve the parole system in the year 2010/2011.³⁰

Secondly, the Committee has also had its own discussions on issues relating to parole. These have included the need for the expeditious implementation of parole legislation,³¹ and overcrowding and the release of prisoners.³² Thirdly, some Committee members, using the question and reply procedure in parliament, have posed the following direct questions relating to parole to the Minister of Correctional Services. One Committee member, Mr. Selfe, asked the Minister of Correctional Services to inform parliament of the number of “offenders who were released on parole [who] committed crimes whilst on parole in each Province in the (i) 2007-08 financial year”, and “for what crimes were the offenders serving a prison sentence in each case”. The Minister answered these two questions in detail giving all the relevant statistics.³³ In another question, the Minister was asked whether the DSC was “investigating and/ or developing the use of satellite-based tracking devices to monitor the movements of ... parolees”. The Minister answered that question in the affirmative, and gave details of the actions being implemented to achieve that objective.³⁴ The fourth way has been for the Committee to invite other stakeholders, such as the chairpersons of different parole boards, to address it on the challenges they face in the execution of their mandate.³⁵ The DCS has also appeared before other parliamentary committees to brief members on the issue of parole. This has been the case with the Security and Constitutional Affairs Select Committee on the

³⁰ Department of Correctional Services Strategic Plan and Budget 2010/2011, 17 March 2010, at <http://www.pmg.org.za/report/20100317-researcher-portfolio-committee-budget-department-correctional-service> [date of use 6 May 2010].

³¹ Canadian Tour; Implementation of Parole Act: Discussion, 23 April 2002, <http://www.pmg.org.za/minutes/20020422-canadian-tour-implementation-parole-act-discussion> [date of use 6 May 2010].

³² Overcrowding in Prisons and Release of Prisoners, Escapes and Anti-Corruption, 3 October 2000 at <http://www.pmg.org.za/report/20001003-overcrowding-prisons-release-prisoners-escapes-anti-corruption> [date of use 6 May 2010].

³³ Questions & Replies No 226 to 250 (question no 237) at <http://www.pmg.org.za/node/20310> [date of use 6 May 2010].

Questions & Replies No 251 to 275 (question 262 by Mr. Selfe) at <http://www.pmg.org.za/node/20311> [date of use 6 May 2010].

³⁵ Portfolio Committee on Correctional Services, Briefing by Selected Parole Board Chairpersons on the Challenges in the Functioning of the Parole Boards, 8 September 2009, at <http://www.pmg.org.za/report/20090908-briefing-selected-parole-board-chairpersons-challenges-functioning-pa> [date of use 6 May 2010].

cost implications of parole supervision and the effectiveness of parole supervision measures.³⁶

It is not only the DCS that has a role to play in the parole process. When addressing the PCCS the chairpersons of the 12 parole boards in the country expressed the need for “greater involvement of the South African Police Services and the Department of Justice in the parole process”.³⁷ The executive, especially the Correctional Services Minister and the Justice and Constitutional Development Minister, also have a role to play in the parole process. Although parole forms part and parcel of the justice system, the author is of the view that it is vital for more research to be carried out justifying the need and/or importance of the South African Police Service’s and the Department of Justice and Constitutional Development’s direct involvement in the parole process. Notwithstanding the foregoing, there are grounds to believe that the Department of Justice and Constitutional Development, like DCS, is indeed playing that role. As indicated earlier, the Minister of Correctional Services has appeared before the PCCS to answer questions relating to parole. He has also answered questions put by individual members of parliament on policies relating to parole. In his 2009 budget speech the Minister of Correctional Services told Parliament:

Our parole system is not a wanton licence to freedom and neither does it nullify the actual sentence imposed by the courts. The parole system aims to extend and grant opportunities for second chances. We hope that as parole is considered, particular attention is paid to the matter of victims of crime, especially victims of violent crimes like murder, robbery and all forms of crimes against women and children. Similarly, offenders who commit further crimes whilst in custody must not expect any sympathy from our parole system.³⁸

³⁶ Community Supervision, Parole Boards and AOPS: Correctional Services Department Briefing, 26 October 2004, at <http://www.pmg.org.za/minutes/20041025-community-supervision-parole-boards-and-apops-correctional-services-department-brie> [date of use 6 May 2010].

³⁷ Correctional Services Portfolio Committee, Parole Board Implementation: Input from twelve parole board chairpersons and minister, 5 September 2006 at <http://www.pmg.org.za/minutes/20060904-parole-board-implementation-input-twelve-parole-board-chairpersons-minister> [date of use 6 May 2010].

³⁸ Speech by Correctional Services Minister, The Honourable Nosiviwe Mapisa-Nqakula, during the Department’s Budget Vote 18, National Assembly (Cape Town), 30 June 2009, at <http://www.pmg.org.za/briefing/20090630-correctional-services-ministers-budget-speech> [date of use 6 May 2010].

In his media briefing the Minister of Justice and Constitutional Development indicated the following as one of the measures to reduce prison overcrowding:

The newly appointed ministerial task team in the Department of Correctional Services (DCS) will, over the next six months conduct an audit of certain categories of offenders with the overall objective of alleviating overcrowding in our correctional facilities. This includes looking into ... backlogs in the hearing of parole applications by Parole Boards.³⁹

The following can be distilled from the above in relation to the role of the legislature, the executive and the judiciary in the parole system. The legislature, through the PCCS and the question and reply procedure, should ask the DCS and the Minister of Correctional Services to provide information relating to the manner in which parole is being administered in the country. In cases where the legislature is of the opinion that the DCS may not have adhered to the established procedure to release an offender on parole, the DCS should be summoned to justify to the Committee why a certain decision was taken or not taken. The Department of Justice and Constitutional Development should, as it has done, work hand in hand with the DCS to ensure that measures are put in place for the parole boards to work effectively and clear the backlog of parole applications. As for the judiciary, it has to be cognisant of the fact that the executive, through the DCS, has the capacity to assess whether an offender is fit to be released on parole without posing a danger to society. This means that unless the refusal by the DCS to release the offender on parole would amount to a violation of the law or principles of natural justice, judges should be very careful not to order the release of offenders on parole in a manner that would usurp the powers of the parole boards.

3. The period to be served before an offender is paroled

At the outset, it is important to highlight the structure of parole granting bodies. Under section 75(1) of the Correctional Services Act, the Correctional Supervision and Parole Board (CSPB) is empowered, after considering the report on a prisoner submitted to it by the Case Management Committee, to place on parole any prisoner serving a determinate sentence exceeding 12 months. In respect of dangerous

³⁹ Media briefing for Justice, Crime Prevention and Security Cluster presented by Minister of Justice and Constitutional Development, J Radebe, 4 March 2010, at <http://www.pmg.org.za/briefing/20100304-justice-crime-prevention-and-security-cluster> [date of use 6 May 2010].

criminals and prisoners serving life sentences, the CSPB is empowered to make a recommendation to the court for their placement on parole.⁴⁰ In terms of section 77(1), the Correctional Supervision and Parole Review Board (CSPRB) is empowered to review the decision of the CSPB should a submission be made to it by the Minister of Correctional Services, the Commissioner of Correctional Services, the Inspecting Judge⁴¹, or the “person concerned.” Under section 75(7)(a) of the Correctional Services Act, the Commission of Correctional Services is empowered to place on parole a sentenced offender serving a sentence of incarceration of 24 months or less.

There are several provisions relating to parole in the Correctional Services Act.⁴² This discussion will be limited to the provisions that govern the majority of prisoners, that is, prisoners serving between two years’ imprisonment and life imprisonment.⁴³ Section 73(6)(a) of the Correctional Services Act provides that:

a prisoner serving a determinate sentence may not be placed on parole until such a prisoner has served either the stipulated non-parole period, or if no non-parole period was stipulated, half of the sentence, but parole must be considered whenever a prisoner has served 25 years of a sentence or cumulative sentences.

Section 73(6)(a) raises three important points. One, any prisoner serving a determinate sentence (apart from an offender sentenced to life imprisonment) may be placed on parole before (if the non-parole period is less) or after serving half of the sentence. The word “may” as opposed to “shall” gives the relevant parole authorities the discretion to place a prisoner serving a determinate sentence on

⁴⁰ Section 75(1)(b) and (c) of the Correctional Services Act. Section 78 governs the release of offenders serving life imprisonment.

⁴¹ See section 75(8), as amended by the Correctional Services Amendment Act 25 of 2008.

⁴² See for example, section 54 (day parole) and Chapter VII.

⁴³ As on the last day of March 2010 there were 114,282 prisoners in South Africa categorised as follows: 4574 serving six months and less; 3996 serving between six and 12 months; 3881 serving between 12 and 24 months; the statistics for those serving between two and three years are not available; 12159 serving between three and five years; 8063 serving between five and seven years; 14726 serving between seven and 10 years; 21128 serving between 10 and 15 years; 12613 serving between 15 and 20 years; 10684 serving 20 years and above; 9677 serving life imprisonment; and 572 serving other sentences, such as, habitual criminals, security offenders, corrective training, prevention of crime, psychopath and other mental instability, reformatory, ordered by court as dangerous, day parole, etc. See Sentencing Length Breakdown as on the Last Day of 2009/06 at <http://www.dcs.gov.za/WebStatistics/> [date of use 11 June 2010].

parole when he has served more than half of the imposed sentence. The second aspect raised by section 73(6)(a) is that a prisoner who was sentenced to a non-parole period can be placed on parole only after he has served that period. In this case, the decision as to when an offender should be eligible for placement on parole is made by the court and not by DCS. However, when the non-parole period expires, DCS has full discretion to decide whether or not, and when, to release an offender on parole. Thirdly, the maximum number of years that a prisoner can serve before he must be considered for parole is 25. This means that even if the court imposed a non-parole period of longer than 25 years, the DCS is obliged to consider the prisoner for parole after he has served 25 years.

Under section 73(6)(v), an offender sentenced in terms of the Criminal Law Amendment Act⁴⁴, which provides for minimum sentences for stipulated offences:⁴⁵

may not be placed on parole unless he or she has served at least four fifths of the term of imprisonment imposed or 25 years, whichever is the shorter, but the court, when imposing imprisonment, may order that the prisoner be considered for placement on parole after he or she has served two thirds of such term.

Regardless of whether an offender's parole is governed by section 73(6)(a) or section 73(6)(v), 25 years is the maximum number of years that an offender must serve before being considered for parole. However, there are two important differences when section 73(6)(v) is compared with section 73(6)(a). Firstly, under section 73(6)(v) an offender has to serve four-fifths of the sentence before being considered for parole, whereas under section 73(6)(a) he is eligible for parole after serving half of the sentence. For example, an offender sentenced in January 2000 to 15 years' imprisonment and whose sentence is governed by section 73(6)(a), will be eligible for parole in June 2007, whereas an offender sentenced at the same time but in terms of Act 105 of 1997 and whose parole is consequently governed by section 73(6)(v) will be eligible for parole in 2012 only. This means that DCS and the Case Management Committees which recommend to the Correctional Supervision and

⁴⁴ Criminal Law Amendment Act, 105 of 1997.

⁴⁵ These sentences range from 5 to 25 years' imprisonment depending on the offence and/or the manner in which the offence was committed. See section 51 of the Criminal Law Amendment Act, 105 of 1997.

Parole Boards must know exactly how to calculate these sentences to avoid releasing prisoners earlier than they should be released or to avoid being taken to court for keeping prisoners in prison longer than the law requires.

4. The stipulated non-parole period

Section 276B(1) of the Criminal Procedure Act⁴⁶ empowers the court to impose a non-parole period. It stipulates:

- (a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.
- (b) Such period shall be referred to as the nonparole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

As stated earlier, section 73(6)(a) of the Correctional Services Act provides that “a prisoner serving a determinate sentence may not be placed on parole until such a prisoner has served ...the stipulated non-parole period ... but parole must be considered whenever a prisoner has served 25 years of a sentence or cumulative sentences”. After the abolition of the death penalty⁴⁷ and before the coming into force of the 1998 Correctional Services Act there was uncertainty in relation for example to which court had the jurisdiction to impose a non-parole period and also to the practical effect of a non-parole period. In *S v Mokoena*,⁴⁸ where the Magistrate convicted the offender of drug trafficking and sentenced him to five years’ imprisonment, the Court invoked section 287(4) of the Criminal Procedure Act⁴⁹ and ordered that the offender should not be considered for parole during the five year period, that is, that he should serve the whole sentence in full. On appeal the High

⁴⁶ Criminal Procedure Act, 51 of 1977 (as amended until 2008).

⁴⁷ See the Constitutional Court decision of *State v Makwanyane* 1995(3) SA 391(CC) in which the Court ruled that the death penalty was unconstitutional for violating the rights to life and to freedom from torture, cruel and inhuman treatment.

⁴⁸ *S v Mokoena* 1997 (2) SACR 502(0).

⁴⁹ Section 287(4) of the Criminal Procedure Act provides that “unless the court which has imposed a period of imprisonment as an alternative to a fine has directed otherwise, the Commissioner [of Correctional Services] or a parole board may in his or its discretion at the commencement of the alternative punishment or at any point thereafter if it does not exceed five years – (a) act as if the person was sentenced to imprisonment in accordance with section 276(1)(i); or (b) ...” Section 276(1)(i) is to the effect that “subject to the provisions of this Act and any other law or the common law, the following sentences may be passed upon a person convicted of an offence, namely – (i) imprisonment from which such a person may be placed under correctional supervision in the direction of the Commissioner [of Correctional Services] or a parole board”.

Court held, *inter alia*, that because the magistrate had sentenced the appellant to direct imprisonment without the option of a fine, section 287(4) of the Criminal Procedure Act was not applicable, and consequently “the magistrate had no power to order that the accused could not be considered for parole”.⁵⁰ In *S v Maseko*⁵¹ the appellant was sentenced to 50 years’ imprisonment for murder and armed robbery with the trial judge “recommending that 30 years thereof should be served before the appellant became eligible for parole.”⁵² On appeal it was held, *inter alia*, “that the recommendation of the trial judge, that at least 30 years of the sentence should be served, was a mere indication of his view of the period that ought to expire before parole was considered, and was not intended to bind the Executive”.⁵³ Likewise, in *S v Sidyno*⁵⁴ the accused was found guilty on seven counts of murder and sentenced to life imprisonment on each count. The Court also recommended that he not be released before he had served 40 years’ imprisonment.⁵⁵ The Court added that it had a right to make a non-parole period recommendation and concluded that “[t]here were also indications that such recommendations were taken into account by the prison authorities”.⁵⁶

With the coming into force of the Correctional Services Act⁵⁷ and the insertion in 1997 of section 276B into the Criminal Procedure Act⁵⁸ there is still confusion in relation to the non-parole period. In *S v Williams* and *S v Papier*⁵⁹, where the Magistrate relied on sections 73(6)(a) and (c) of the Correctional Services Act to impose a non-parole period on the offenders, the High Court, on review, held that in imposing sentence a court cannot fix a non-parole period in terms of sections 73(6)(a) and (c) of the Correctional Services Act, but rather that a court wishing to fix a non-parole period has to do so in terms of section 276B of the Criminal Procedure

⁵⁰ *S v Mokoena* (n 48) 503.

⁵¹ *S v Maseko* 1998 (1) SACR 451(T).

⁵² *S v Maseko* (n 51) 453.

⁵³ *S v Maseko* (n 51) 453.

⁵⁴ *S v Sidyno* 2001(2) SACR 613(T).

⁵⁵ *S v Sidyno* (n 54) 614.

⁵⁶ *S v Sidyno*, (n 54) 614. In *S v Leholoan* 2001(2) SACR 297(T), the Court had erroneously imposed a non-parole period on an offender sentenced to life imprisonment before the coming into force of sections 276B of the Criminal Procedure Act and 73(6)(a) of the Correctional Services Act.

⁵⁷ In October 2004.

⁵⁸ Section 276B was inserted into the Criminal Procedure Act by section 22 of the Parole and Correctional Supervision Amendment Act, 87 of 1997.

⁵⁹ *S v Williams*; *S v Papier* 2006(2) SACR 101(C).

Act.⁶⁰ This is so because sections 73(6)(a) and (c) of the Correctional Services Act merely set out the applicable procedure when a court has prescribed or not prescribed a non-parole period. The High Court warned that section 276B of the Criminal Procedure Act should be invoked in exceptional circumstances only. Furthermore, the Court added, the effect of section 276B is that the prisoner cannot “be released on parole or correctional supervision until the expiry of the non-parole period”.⁶¹ However, in *S v Botha*⁶² the High Court convicted the appellant of murder and attempting to defeat the ends of justice, sentenced him to 18 years’ imprisonment, and recommended that he should serve at least two-thirds of the sentence before being considered for parole. On appeal, the Supreme Court of Appeal held, *inter alia*:

The function of a sentencing court is to determine the term of imprisonment that a person, who has been convicted of an offence, should serve. A court has no control over the minimum period of the sentence that ought to be served by such a person. A recommendation of the kind encountered here is an undesirable incursion into the domain of another arm of State, which is bound to cause tension between the Judiciary and the executive. Courts are not entitled to prescribe to the executive branch of government how long a convicted person should be detained, thereby usurping the function of the executive... Albeit just a recommendation, its persuasive force is not to be underestimated. It, no doubt, was intended to be acted upon. In making the recommendation which it did, the trial Court may have imposed, by a different route, a punishment which in truth and in fact was more severe than originally intended. Such a practice is not only undesirable but also unfair to both an accused person as well as the correctional services authorities. The Registrar has been instructed to forward a copy of this judgment to the Department of Correctional Services with a request that the remarks [above] be taken account of in relation to the present case.⁶³

S v Botha, which was decided before the amendment to the Criminal Procedure Act came into operation, raises at least two critical issues in relation to the power of the court to recommend a non-parole period. First, it showed that the Court was very careful not to encroach on the territory of the executive – that is to say, courts should be concerned only with sentencing and not with how much of the sentence should be

⁶⁰ In *S v Mshumpa and Another* 2008(1) SACR 126(E), the accused were found guilty of various serious offences, and the Court invoked section 276B of the Criminal Procedure Act to fix a non-parole period.

⁶¹ *S v Williams*; *S v Papier* (n 59) 103.

⁶² *S v Botha* 2006(2) SACR 110 (SCA).

⁶³ *S v Botha* (n 62) paras 25 – 27.

served. The latter issue falls within the discretion of DCS. Secondly, the Supreme Court of Appeal was of the view that although it is “just a recommendation”, a non-parole period would be considered by DCS in deciding when the prisoner should be released on parole. Unlike in *S v Botha*, where the Supreme Court of Appeal held that a non-parole period is just a recommendation whose persuasive as opposed to binding force cannot be ignored, courts are now, and correctly so, of the view that the non-parole period is a binding order as opposed to a mere recommendation. In *S v Mshumpa and Another*,⁶⁴ where the first accused was convicted of serious offences including murder and sentenced to 21 years’ imprisonment, the High Court held that “in terms of s 276B of the Criminal Procedure Act, it is ordered that [the offender] will not be placed on parole for a period of 13 years...”⁶⁵ It is clear that in this ruling the High Court is making an order, as opposed to a recommendation, that the offender must not be paroled before he has served 13 years.

The Supreme of Court of Appeal’s ruling in *S v Botha* that a non-parole period is a mere recommendation was informed by the fact that in its judgment the Court did not refer to sections 276B(1) of the Criminal Procedure Act and section 73(6)(a) of the Correctional Services Act, both of which provide for a non-parole period. Had the Supreme Court of Appeal referred to the above two sections, its ruling probably would have been different. Another problem associated with the Supreme Court of Appeal’s ruling in *S v Botha* is in relation to the principle of the separation of powers in sentencing, based on the 1997 case of *S v Mhlakaza and Another*,⁶⁶ which was decided before the coming into force of section 73(6)(a) of the Correctional Services Act, which specifically provides that a non-parole period imposed by the court has to be completed before a prisoner is released on parole. In late 2008 the Supreme Court of Appeal clarified the legal position relating to the non-parole period. In *S v Pakane and Others*⁶⁷ the Supreme Court of Appeal upheld the High Court’s conviction of the appellant, a police officer, for murder and defeating the ends of justice, sentenced him to 15 years’ imprisonment, and ordered that he should serve a non-parole period of “not less than ten years”.⁶⁸ Maya J concluded:

⁶⁴ *S v Mshumpa and Another* (n 60).

⁶⁵ *S v Mshumpa and Another* (n 60) para 87.

⁶⁶ *S v Mhlakaza and Another* 1997(1) SACR 515(SCA).

⁶⁷ *S v Pakane and others* 2008(1) SACR 518(SCA).

⁶⁸ *S v Pakane and Others* (n 67) para 48.

It seems to me that the legislature enacted the provisions [of section 276B] to address precisely the concerns raised [in *S v Botha* and in *S v Mhalakaza*] by clothing sentencing courts with power to control the minimum or actual period to be served by a convicted person...

The above ruling clearly shows that a non-parole period is not a mere recommendation. It is an order that must be adhered to by DCS. However, the Court's order contains an inherent problem. As we have seen earlier, in all their decisions courts have specifically stated the number of years that the offender must serve before being considered for parole. However, in the *Pakane* case the Supreme Court of Appeal held that the offender should not be considered for parole unless he has served "not less than ten years" of the 15 years' sentence. Although some people could argue that this amounts to a non-parole period of 10 years, it also could be argued that this ruling is vague as it could mean that the offender could serve anything between 10 years and 14 years and 11 months. The above discussion indicates that the non-parole period is now an established feature of the South African sentencing regime formally provided for in the Correctional Services Act and the Criminal Procedure Act. Moreover, courts increasingly seem to be imposing it, particularly in respect of offenders convicted of offences of a heinous nature.

5. Releasing prisoners on parole: judicial intervention

Although the Correctional Services Act provides for the circumstances in which a prisoner qualifies to be released on parole, prisoners have on several occasions litigated against DCS and CSPBs asking courts to order the CSPBs, among other things, to rely on the correct law in reaching parole decisions, exercising their parole powers in line with the law, and in some circumstances placing offenders on parole. The law relating to parole has changed several times in South Africa with the result that many prisoners, correctional officials and parole board members have understandably found it difficult to establish which specific provision governs specific prisoners. In this growing confusion there has been an increase in the number of parole-related judgments emanating from South African courts. They indicate that there appears to be a general view held by many prisoners that parole proceedings are unfair to them. In order to be in a position to sufficiently "rebut any baseless allegations of unreasonableness in the parole process", the High Court, although in passing, has advised "the Department of Correctional Services to record parole

hearings electronically and to have the record typed and certified”.⁶⁹ Some of the parole-related cases from different courts are discussed below to indicate how courts have dealt with the issue of the release of prisoners on parole.

In *Combrink and Another v Minister of Correctional Services and Another*⁷⁰ the applicants were sentenced to long prison terms⁷¹ before 1 April 1998. At the time of their sentence the Correctional Services Act⁷² and the parole guidelines that were developed in terms of the Act required, among other things, that “a prisoner could be considered for parole after serving one half of his sentence less any credits⁷³ that he was entitled to”.⁷⁴ On 23 April 1998 DCS issued and circulated to all prisons a policy document which intended, among other things, to bring about uniformity in relation to parole procedures and decisions. The adoption of the policy document meant that the first applicant (Combrinck) would have to be considered for parole after serving three-quarters of his sentence and the second applicant four-fifths of his sentence. The applicants argued before the court that “[t]he respondent's actions in making this document applicable to them and to other prisoners who were in prison as at April 1998 thus constitutes retrospectively an infringement of their constitutional rights and in particular to s 33(1) of the Constitution”.⁷⁵ After holding that the parole boards are indeed empowered to take administrative actions when deciding whether or not to place prisoners on parole, the court concluded:

[T]he administrative action referred to in this judgment falls foul of s 33 of the Constitution and indeed infringes the applicants' right to fair, that is to say, procedurally fair, and reasonable administration. Prisoners incarcerated prior to 1998 had at the very least a legitimate expectation that, upon the happening of defined events such as having served half their sentence, their case for placement on parole would be considered and would be done in accordance with existing criteria and guidelines set out in the Act. The document alters all this and does so retrospectively.⁷⁶

⁶⁹ See *Mans v Minister van Korrektiewe Dienste en Andere* 2009(1) SACR 321(W), in which the Court, although dismissing the prisoner's application to order DCS to tape record and transcribe his eventual parole proceedings, recommended, albeit *obiter*, that DCS should consider tape recording parole proceedings. 324.

⁷⁰ *Combrink and Another v Minister of Correctional Services and Another* (n 18).

⁷¹ The facts of the case are silent on the exact number of years to which each applicant had been sentenced.

⁷² Act 8 of 1959.

⁷³ For a detailed discussion of the credits system and the problems that were associated with it, hence leading to its eventual abolition in 1997, see Lidovho 2003 SACJ 166 – 175.

⁷⁴ *Combrink and another v Minister of Correctional Services and Another* (n 18) 340.

⁷⁵ *Combrink and another v Minister of Correctional Services and Another* (n 18) 342.

⁷⁶ *Combrink and Another v Minister of Correctional Services and Another* (n 18) 342 – 343.

The Court was quick to “to make it abundantly clear” to the applicants and to everyone “that the relief granted must not be construed as meaning that the applicants are entitled to be placed on parole or indeed that they are entitled to be considered for parole”.⁷⁷ However, the above ruling raises at least three important points. One, whenever DCS revises its guidelines relating to parole, caution must be exercised to ensure that prisoners who are serving sentences at the time the new laws or guidelines come into force are not adversely affected, that is to say, do not end up serving longer (than what was initially intended) prison terms before being considered for parole.⁷⁸ Two, the Court was very clear that its decision did not in any way mean that the prisoners were entitled to be placed on parole. Placing a prisoner on parole is an administrative decision that lies within the powers and discretion of the parole board, and the Court could not usurp the parole board’s power. However, the judgment also indicates that, should the applicants challenge the constitutionality of the laws and guidelines on which the parole board is likely to base its decision, the Court was willing to closely scrutinise the constitutionality of those laws and guidelines. In other words, the Court did not tell DCS what to do, but merely that it must do something by a certain date.

The June 2008 Transvaal Provincial Division High Court decision of *Lombaard v Minister of Correctional Services and Others and Two Similar Cases*⁷⁹ illustrates how courts are determined to ensure not only that parole decisions are made in accordance with the law, but also how courts are increasingly intervening to see to it that prisoners are placed on parole. The applicants had been sentenced to lengthy prison terms before the coming into force of the 1998 Correctional Services Act. They argued that they qualified to be placed on parole after serving just more than one-third of their sentences, as provided for by the 1959 Correctional Services Act. After serving more than one-third of their respective sentences, and despite various appearances before the CSPB, they were not placed on parole. Consequently “they approached the High Court for an order setting aside the CSPB’s decisions and ordering them to be placed on parole within 30 days”.⁸⁰ While their applications were

⁷⁷ *Combrink and Another v Minister of Correctional Services and Another* (n 18) 343.

⁷⁸ Therefore, the parole in place at the time of sentencing is the one that applied to the prisoner.

⁷⁹ *Lombaard v Minister of Correctional Services and Others and Two Similar Cases* 2009(1) SACR 157(T).

⁸⁰ *Lombaard v Minister of Correctional Services and Others and Two Similar Cases* (n 79) 157.

pending before the High Court, the Commissioner of Correctional Services invoked section 75(8) of the 1998 Correctional Services Act and referred the CSPB's decision to the Correctional Supervision and Parole Review Board (CSPRB) for review and ruling as to whether or not the applicants should be placed on parole. The attorney for DCS submitted that, because the Commissioner had referred the applicants' cases to the CSPRB, the application should be struck off the role as the matter would be properly dealt with by the CSPRB.⁸¹ The applicants argued that the Commissioner's decision to refer the matter to the CSPRB was aimed at barring the court from reversing the decision of the CSPB.⁸² The Court held that section 75(8) did not compel the Commissioner to refer the applicants' matter to the CSPRB, and held:

[T]he referral to the review board is not to be equated with an internal remedy in terms of s 7(2) of the Promotion of Administrative Justice Act... This is so because the inmate, a person vitally affected by the ... [CSPB's] decision, has no right to approach the review board to claim a reconsideration of the [CSPB's] administrative action. The fact that an inmate who is dissatisfied with the ... [CSPB's] decision might approach the commissioner or the minister with a request to refer the matter to the review board cannot alter the position.⁸³

The Court set aside the decision of the CSPB declining to place the applicants on parole, and ordered that the applicants be placed on parole within 30 days, subject to the determination of appropriate conditions by DCS and the CSPB.⁸⁴ There are at least three important issues to be deduced from the *Lombaard* ruling. One, courts are willing to scrutinise CSPB decisions to ensure that prisoners who qualify to be placed on parole are not prejudiced by the CSPB's misunderstanding of the law relating to the parole of prisoners. Two, although aware that the Commissioner or the Minister may refer the CSPB's decision to the CSPRB for re-consideration, the Court is alive to the fact that the existence of such an option to the Commissioner and the Minister does not prevent prisoners who are not satisfied with the decision of the CSPB from petitioning courts to scrutinise the decision of the CSPB. If the law allowed prisoners who are not satisfied with the decision of the CSPB to petition the CSPRB to review the former's decision, it would have been unlikely for courts to

⁸¹ *Lombaard v Minister of Correctional Services and Others and Two Similar Cases* (n 79) para 15.

⁸² *Lombaard v Minister of Correctional Services and Others and Two Similar Cases* (n 79) para 18.

⁸³ *Lombaard v Minister of Correctional Services and Others and Two Similar Cases* (n 79) paras 23-24.

⁸⁴ *Lombaard v Minister of Correctional Services and Others and Two Similar Cases* (n 79) para 42.

intervene before the latter makes its decision. With the law as it stands now, all the decisions of the CSPB will be taken as final and therefore open to challenge before the courts. Lastly, the Court did not shy away from ordering the CSPB to place prisoners on medical parole within a stipulated number of days. However, in what could be interpreted as a claw-back provision, the Court makes it clear that DCS and the CSPB could still, if they deem it fit, refuse to place the prisoners on parole should the conditions be inappropriate for their placement on parole. Here the court makes it clear that it remains within the powers of the executive to determine whether or not a prisoner should be placed on parole, but that that power must be exercised in accordance with the law.

6. Conclusion

The above discussion has dealt with some legal provisions, case law and the practice of the legislature and the executive relating to parole in South Africa. It has been illustrated that this is an area in which confusion reigns because, *inter alia*, of the various amendments to the Correctional Services Act regulating parole, the various policies and/or regulations adopted by DCS to regulate the release of prisoners on parole, and the different understanding that different courts have had in relation to the length of the sentence an offender should serve before being considered for parole. The above confusion could be minimised *inter alia* by simplifying the law relating to the release of offenders on parole so that prisoners, members of the Case Management Committees and parole boards who are not well conversant with the law understand it and apply it consistently. Parole manuals in different languages could be developed and made widely accessible to prisoners so that they can calculate or be helped by their colleagues or prison authorities to determine the exact date on which they are eligible to be considered for parole and also what is expected of them to enhance their prospects of being released on parole. This will possibly reduce the number of prisoners who resort to courts for orders to force DCS to consider them or release them on parole.

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